

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 1221 of 1999

in

SPECIAL CIVIL APPLICATION NO 1942 of 1999

with  
civil application no. 11090 of 1999

For Approval and Signature:

Hon'ble ACTG.CHIEF JUSTICE MR. C.K.THAKKAR and

MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed : YES  
to see the judgements?
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy : NO  
of the judgement?
4. Whether this case involves a substantial question : NO  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? : NO

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JAGDISHBHAI MOHANLAL JOSHI

Versus

STATE OF GUJARAT

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Appearance:

MR M.R.ANAND WITH MR A J SHASTRI for Appellant  
MR SP HASURKAR for Respondent No. 2  
Ms Katha Gajjar, Asstt. Govt. Pleader for  
respondent No.1

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CORAM : ACTG.CHIEF JUSTICE MR. C.K.THAKKAR and

MR.JUSTICE D.P.BUCH

Date of decision: 24/12/1999

ORAL JUDGEMENT

Admitted. Mr.S.P. Hasurkar appears and waives service of notice of admission on behalf of respondent No.2 and Ms Gajjar appears and waives service of admission on behalf of respondent No.1. In the facts and circumstances of the case, the matter is taken up for final hearing today.

This appeal is filed against dismissal of SCA No. 1942 of 1999 by the learned Single Judge. Appellant was the original petitioner. He filed the above petition for an appropriate writ, order or direction directing the respondents to give him promotion to the post of Junior Staff Officer in Home Guards Organization.

Learned Single Judge issued Notice pursuant to which the parties appeared. An affidavit in reply was filed on behalf of the respondents to which affidavit in rejoinder was filed. Learned Single Judge ,however, observed that under the statutory rules, hierarchy of promotion was from Head Clerk to Office Superintendent and then to Junior Staff Officer.

According to the learned Single Judge, since the petitioner was holding the post of Head-clerk, he could not be considered for promotional post of Junior Staff Officer inasmuch as he was not promoted to the intervening cadre of Office Superintendent. Another fact which weighed with the learned Single Judge was that the said contention of the respondent authorities in the affidavit in reply was not controverted by the petitioner by filing affidavit in rejoinder. Learned Single Judge, therefore, held that no case was made out to interfere with the action of the respondents and accordingly, the petition was dismissed.

Mr. M.R.Anand , Senior Advocate for Mr. Shastri for the appellant contended that on both the factual aspects , the learned Single Judge was not right. He submitted that statutory rules framed under the proviso to Article 309 of the Constitution were on record and they did not provide such hierarchy.

Rule 2 of the Junior Staff Officer Gazetted Class II (Home Guards Organization ) Recruitment Rules, 1971 reads as under :

"2. Appointment to the post of Junior Staff Officer , Gazetted class II in the Home Guards Organization shall be made either-

- (a) by promotion of a person of proved merit and efficiency from amongst persons holding supervisory post for not less than 5 years, in the Home Guards Organization and who has passed the requisite departmental examination
- (b) by direct selection."

It was, therefore, submitted that though it was contended by the Under Secretary, Home Department in the affidavit in reply that as per the set up, following hierarchy of the Organization was in existence, viz.

J.S.D.

O.S

Head clerk

Senior clerk

Junior clerk

in fact, the Rules did not contemplate such hierarchy that the learned Single Judge has committed an error of law in relying on clause (B) of para 1 of the affidavit in reply and in dismissing the petition.

He further submitted that the learned Single Judge was also not right in observing that the facts stated and contentions raised in the affidavit in reply remained uncontested and no affidavit in rejoinder was filed. In fact, such rejoinder was filed but somehow or other, it was not tagged with the main matter. But in the rejoinder, it was asserted that it was not necessary for a Head clerk to be Office Superintendent before he could be promoted as Junior Staff Officer. Some instances were also mentioned in the affidavit in rejoinder.

Looking to the statutory rules, *prima facie* the contention of the appellant appears well founded and deserves to be considered. Rules do not expressly provide for such hierarchy of cadres. Moreover, in the affidavit in rejoinder, instances have been cited to the contrary. Since the learned Single Judge has disposed of the petition only on the ground of ineligibility of the appellant, in our opinion, the appeal deserves to be allowed partly and the impugned order deserves to be set aside.

For the foregoing reasons, LPA is allowed and the order passed by the learned Single Judge is set aside and the matter is remanded to the learned Single Judge. We may, however, state that we are not expressing final opinion on the merits of the matter one way or the other. As and when the matter is taken up for hearing, the same will be decided on merits. No order as to costs. No order on civil application.

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parekh